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The North American Free Trade Agreement's Motor Carrier Provisions

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The American Trucking Associations, Inc. (ATA), with offices located at 2200 Mill Road, Alexandria, Virginia 22314-4677, is the national trade association of the trucking industry. Through our affiliated trucking associations, and their over 30,000 motor carrier members, affiliated conferences, and other organizations, ATA represents every type and class of motor carrier in the country.

ATA has long viewed free trade as an important tool in improving our country's economic growth. Since the North American Free Trade Agreement (NAFTA) was implemented, trade between the United States and Mexico has more than tripled from \$81 billion in 1993 to \$246 billion in 2000¹.

The trucking industry plays a critical role in the success of NAFTA. Trucks transport over 80% of the value of U.S.-Mexico trade, and over 70% for U.S.-Canada trade. Trucking companies have benefited from the growing trade volumes among the NAFTA partners, considering that higher trade flows have resulted in more business for motor carriers in all three nations. Implementing NAFTA's trucking provisions will allow motor carriers to better meet the transportation demands of our growing trade flows, doing so in an efficient, effective, and safe manner.

NAFTA and Trucking. The trucking industry has long supported NAFTA. Therefore, ATA firmly opposed the delay by the U.S. Government in implementing the essential cross-border trucking provisions of NAFTA. The delay has arbitrarily denied Canada, Mexico and the United States the full benefits of this important trade agreement, negatively impacting U.S. shippers and carriers engaged in NAFTA trade.

Under NAFTA, beginning on December 18, 1995, U.S. and Mexican carriers were to have been allowed to pick up and deliver international freight into each other's states contiguous to the U.S.-Mexico border. By January 1, 2000, access would expand to all states on either side of the border.

¹ Source: International Trade Administration, U.S. Department of Commerce

NAFTA's trucking provisions would enhance the competitiveness of U.S. goods in the Mexican market by providing U.S. exporters and importers an efficient cross-border trucking operation.

When then Secretary of Transportation Federico Peña announced that the implementation of NAFTA's motor carrier provisions were being postponed, he cited safety and security concerns regarding Mexican trucks operating in the United States as the reason for the delay. However, it is important to remember that NAFTA's trucking provisions require all foreign carriers operating in the United States to abide by U.S. standards and regulations, so only Mexican carriers who applied and then met U.S. standards would be given U.S. operating authority. ATA fully supports rigorous enforcement of all U.S. standards for all carriers operating in this country, U.S. and foreign. The current freeze on NAFTA, however, imposes a presumption of guilt based upon national origin: no matter how safe the Mexican trucking company, it cannot get permission to leave the border zone.

The trucking provisions of NAFTA also allowed U.S. and Canadian carriers to improve their ability to invest in the Mexican market. Starting on December 18, 1995, U.S. and Canadian investors have been permitted to invest in up to 49 percent ownership of Mexican trucking companies or terminals providing exclusively international freight services. On January 1, 2001, the investment ceiling increased to 51 percent, and, on January 1, 2004, the rights expand to 100 percent. In the United States, starting on December 18, 1995, Mexican investors were to be allowed to invest up to 100% in a U.S. trucking company providing international freight services. This commitment had also remained unfulfilled until President Bush lifted the moratorium on investment by Mexican nationals on June 6 of this year.

Because the NAFTA trucking provisions have been delayed, trucking companies that have invested in equipment to provide a first rate freight service throughout North America, are left to operate in an outmoded and ineffective freight transfer system at the U.S.-Mexico border. A shipment traveling from the United States to Mexico, or vice-versa, requires no less than three drivers and three tractors to perform a single international freight movement. Through interline partnerships, freight is handled on the U.S. side by a U.S. carrier and on the Mexican side by a Mexican carrier, with a "drayage" hauler in the middle. The drayage truck ferries loads back and forth across the border to warehouses or freight yards for pickup or subsequent final delivery.

Congestion is compounded because trailers come back empty after delivering their freight across the border and because drayage "bobtails" (tractors without trailers) deliver a trailer only one-way across the border and return solo. In addition to requiring two long-haul carriers, one on either side of the border, and a drayage carrier to haul the shipment across the border, the process includes freight forwarders, customs brokers, as well as the official processing handled by government inspectors and enforcement officials. This process results in extra trucks on the road, congestion, delays and "over handling" of shipments that invariably leads to increased costs, and lost and damaged freight.

Furthermore, the existing border infrastructure and human resources are seriously overburdened by the increased congestion generated by the growth in trade flows and the present outmoded cross-border trucking scheme. If, as anticipated, trade flows between Mexico and the United States continue to grow, the border facilities and personnel will only be further strained. To illustrate, according to a study by the International Association of Chiefs of Police (IACP), from 1994 to 1999, northbound

truck crossings increased from 2.7 million to over 4.5 million. It is important to remind this Committee that these numbers reflect truck crossings and not the actual number of trucks crossing. According to the IACP, about 80,000 trucks accounted for the 4.5 million truck crossings.²

Drayage vs. Long-haul. The trucks presently crossing the border into the United States are drayage trucks. It is these drayage trucks that are being inspected when crossing the border into the United States and that have a high out of service rate as detailed in the U.S. Department of Transportation Inspector General's report (IG report) published in December 1998. (Report # TR-1999-034)

However, the very same situation that occurs with drayage operations on the U.S.-Mexico occurs, regrettably, each day at intermodal terminals in the United States. For example, in Kansas City, Missouri, in the heart of America, drayage trucks perform transfer movements at the second busiest intermodal rail facility in the nation. According to the Kansas City Police Department, the out of service rate in Kansas City for drayage trucks is 45 –50%, about the same as drayage operations at the port of entry in Laredo, Texas.

Drayage operations use older equipment because they are simply performing short transfers of freight from one side of the border to the other side, or from one end of the intermodal facility to the other end. Motor carriers, either on the U.S.-Mexico border, or in Kansas City, Missouri, do not invest \$100,000.00 in equipment to perform short drayage operations. They simply cannot afford to do so. Motor carriers that buy new and expensive equipment do so for long-haul movements. Therefore, the trucks crossing the border today are not the same Mexican trucks that would operate in the United States once NAFTA's trucking provisions are implemented.

The IG report states that of the Mexican trucks crossing the border, an inordinate percentage of them, 44%, are put out of service, compared to 25% for the U.S. and 17% for Canada. It is critical to note that these are not random inspections, but targeted inspections by trained inspectors who know what they are looking for. The report recognizes that this population of drayage trucks may not be "statistically representative of the universe of Mexican trucks that are non-compliant." Furthermore, the study also raises that "once the border is open to long-haul traffic, the number and percentage of safety compliant Mexican trucks will dramatically increase because long haul trucks will be different from, and in better condition, than the shorter haul trucks" used for drayage in the commercial zones.

It is important to note, however, that in a subsequent study of U.S.-Mexico cross-border trucking operations, the IG reported that the out of service rate for Mexican trucks entering the U.S. dropped from 44% in 1998 to 36% in 2000³.

In addition, the IG report stated that there is a strong correlation between the quality level of inspection procedures and facilities, and the out-of-service rate of Mexican trucks crossing the border

²International Association of Chiefs of Police; *Estimates of Commercial Motor Vehicles Using the Southwest Border Crossings*, Economic Data Resources, Bethesda, Md, September 20, 2000, appendix A

³*Interim Report on Status of Implementing the North American Free Trade Agreement's Cross Border Trucking Provisions*, U.S. DOT Inspector General Report # MH-2001-059, May 8, 2001, pg. 7

into the U.S. In California, the out of service rate of Mexican trucks is 28% (nearly the same as the U.S. rate), compared to Texas at 50%. These out of service rates also changed in the 2001 IG report, with California down to 26% and Texas at 40%. According to both IG reports, the more rigorous inspection procedures in California encourage Mexican truckers to make sure their equipment is up to U.S. standards. The reports also stated that there is a need for increased funding to hire additional inspectors and to build adequate border inspection facilities. ATA agrees with this assessment, and therefore believes it is critical that the resources requested by the President for FY2002 to hire more inspectors and to build inspection facilities be fully funded.

The IG report concluded that too few trucks “are being inspected at the U.S.-Mexico border, and that too few inspected trucks comply with U.S. standards.” Considering that the present trucks are the pre-NAFTA drayage trucks, this is no surprise. Once NAFTA’s trucking provisions are implemented, safety and congestion will be improved at the border by reducing the dependency on drayage operators to transfer trailers across the border, and therefore reducing the number of empty trailers and bobtail tractors operating at the border.

Motor Carrier Safety Encompasses More Than Equipment Condition. ATA believes it is important for the Committee and the public to recognize that motor carrier safety is a much broader issue than just the condition of the truck that is being operated on the highway. In fact, a more important component of truck safety is the licensing and qualification of the driver operating the truck. This statement is supported by the fact that general vehicle crash causation studies consistently indicate that approximately 90 percent of vehicle crashes are caused by actions or mistakes on the part of the driver. This is true whether the issue is passenger car crashes, or truck-involved crashes. Conversely, only a very small percentage of vehicle crashes are caused by defects in the vehicle being operated. Given these facts, it is curious why so much attention in the Mexican truck safety debate has been placed on the out-of-service rates of Mexican trucks.

In ATA's view, the overall safety of the Mexican trucking industry has been inappropriately labeled as less than satisfactory based primarily on the condition of Mexican drayage trucks operating in the U.S. commercial zones. This is unfortunate, and it seems unwise from a motor carrier safety and a general highway safety perspective, to put so much emphasis on the equipment and pay so little attention to what systems are in place regarding the driver.

The Committee should be aware that the Mexican federal government has had an effective commercial driver licensing program in place for years. In fact, in 1991 the standards and procedures for issuing a Mexican Licencia de Federal were recognized by the U.S. Department of Transportation as equivalent to their own Commercial Driver's License (CDL) standards and procedures. The reciprocity agreement recognizing this fact was signed by both countries in 1991, despite the fact that the CDL program in the U.S. was not fully operational until a year later.

Additionally in 1991, the U.S. Department of Transportation recognized the Mexican government's medical requirements for truck drivers as equivalent to those in place in the U.S. A reciprocity agreement is in place between both countries on this important driver-related issue as well. The Mexican government has also had in place since 1993 hours of service and logbook regulations for truck drivers hauling hazardous materials. These requirements were recently extended to all Mexican

truck drivers.

It is true that the Mexican regulatory regime is not identical to that which is in place in the U.S. However, the same statement can be made for the regulatory system in place in Canada. The fact is that every truck and truck driver from Mexico that will operate in the U.S. must abide by all U.S. safety requirements when operating in this country. The U.S. Department of Transportation should be allowed to assess during the application process a Mexican trucking company's ability to meet the standards, and those carriers and drivers that can pass the test, should be allowed to operate in the U.S.

Language requirements. NAFTA's Land Transportation Standards Subcommittee (LTSS) has determined that there are minimal differences among the three NAFTA member countries, which do not affect the safety of cross-border trucking services.

Foreign drivers, be they from Mexico, French-speaking Quebec, Poland or Russia, are required to have sufficient ability to understand road signs and to have basic proficiency levels to communicate in English when driving in the U.S. The Code of Federal Regulations, CFR 49, Section 391.11 (b)(2) states that a person is qualified to drive a commercial vehicle if he/she "can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records."

It is important to note that the ability to fluently speak the language of the host country in which a truck driver is operating does not represent an essential safety concern. Proof of this is the European Union where truck drivers from member countries operate freely throughout the region.

Labor requirements. Mexican drivers entering the U.S. for the purpose of delivering and picking up international cargo are considered as temporary business visitors, and therefore not subject to U.S. domestic labor laws. This definition is included in the NAFTA text in Chapter XVI, Annex 1603, Section A, Business Visitors, 1, which states: "Transportation operators transporting goods or passengers to the territory of a Party from the territory of another Party, or loading and transporting goods or passengers from a territory of a Party, with no unloading in that territory, to the territory of another Party."

Since a Mexican driver receives compensation in Mexico, and has an employment relationship with a Mexican-based company, the driver is covered by Mexico's labor laws, not U.S. labor laws. These are the same requirements that cover Canadian drivers driving in the United States.

Recent developments. ATA strongly supported the final finding released on February 6, 2001 by the NAFTA Arbitration Panel. The panel ruled that the U.S. had not met its commitments as established under NAFTA, and therefore should begin processing the applications of Mexican carriers. The arbitration panel also ruled that:

*"The United States may not be required to treat applications from Mexican trucking firms in exactly the same manner as applications from U.S. or Canadian firms, **as long as they are reviewed on a case by case basis.** (Emphasis added) U.S. authorities are responsible for the safe operation of trucks within U.S. territory, whether ownership is*

*U.S., Canadian or Mexican...Thus, to the extent that the inspection and licensing requirements for Mexican trucks and drivers wishing to operate in the United States may not be “like” those in place in the United States, different methods of ensuring compliance with the U.S. regulatory regime may be justifiable. However, if in order to satisfy its own legitimate safety concerns the United States decides, exceptionally, to impose requirements on Mexican carriers that differ from those imposed on U.S. or Canadian carriers, then **any such decision must (a) be made in good faith with respect to a legitimate safety concern and (b) implement differing requirements that fully conform with all relevant NAFTA provisions.***” (Emphasis added)

Following the guidance of the Arbitration Panel, on May 3, 2001, FMCSA published three notices of proposed rulemaking (NPRM) in the *Federal Register*. These proposed rules relate to the process by which Mexican motor carriers will have to complete to obtain U.S. operating authority. The three proposed rules are as follow:

- Revision of regulations and a new application form to be filled by Mexican motor carriers that intend to operate in U.S. commercial zones contiguous to the U.S.-Mexico border (Form OP-2);
- A new application form for Mexican motor carriers that intend to operate in U.S. territory beyond the commercial zones (Form OP-1(MX); and,
- A new safety audit review mandated by the 1999 Motor Carrier Safety Improvement Act (MCSIA), which would be required of all new motor carriers recently granted operating authority by the U.S. Department of Transportation within an eighteen month period.

In its comments to FMCSA in relation to the proposed rules, ATA recognized the Arbitration Panel’s objective stated above granting the U.S. government the ability to request information from Mexican motor carriers above and beyond what is requested from new U.S. or Canadian carriers. Although the proposed rules do raise questions about violating the “national treatment” and “most favored nation” clauses established under NAFTA, ATA expects FMCSA’s final rules to still require Mexican carriers to provide far more information on their ability to meet U.S. safety standards than carriers from the United States or Canada. Any concerns over safety of these carriers from Mexico and their trucks and drivers can and will be addressed in the rules for implementing the NAFTA agreement. The bottom line is that every trucking company, every truck and every driver entering the United States will be required to meet each and every U.S. safety requirement only after undergoing a comprehensive review through the proposed FMCSA applications, of their ability to meet those standards.

Conclusion. ATA continues to encourage the United States and Mexico to agree on comprehensive safety standards through the work of the LTSS, establish and test effective enforcement programs, and staff border facilities with full time inspectors as they move forward in implementing NAFTA’s trucking provisions. In 1999, ATA worked aggressively to include language in the legislation that created the FMCSA requiring that all trucks entering the U.S. from Mexico under NAFTA must meet U.S. truck safety standards.

ATA strongly believes that motor carriers operating in the United States, no matter what their nationality, must abide by U.S. safety standards. However, ATA is concerned that attacks on our Mexican counterparts are more based on an incomplete understanding of motor carrier safety and prejudice towards Mexican carriers, instead of being based on hard facts related to safety.

The U.S. trucking industry, shippers and the American consumers that we serve have already seen considerable benefits from NAFTA, i.e. job creation, opening of new markets for U.S. goods and services, business expansion opportunities, reduction in tariffs, and increased production efficiencies. Although NAFTA has proven beneficial to U.S. industries and consumers, the U.S. Government's decision to delay cross-border trucking service has unduly penalized not only the transportation industry, but also U.S. exporters and importers alike.

Implementation of NAFTA's trucking provisions will eliminate a cumbersome, outdated and costly system of moving freight across the border, and replace it with an efficient, transparent and safe cross-border trucking process. It is essential that public officials remember that implementing NAFTA's trucking provisions will also allow for U.S. carriers to increase to further improve their ability to provide cross-border freight services between the U.S. and Mexico. Once the border is opened, our countries can begin to recognize the full benefits of NAFTA and increased trade between the United States and Mexico. Then, we can focus our efforts on the many business and practical issues that will arise from the cross-border integration process, which can only be tackled with the goodwill of committed trading partners.